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IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM DAVIS,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT AND TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED

1. Whether the plea and the conviction for attempted bribery in the second degree were constitutionally invalid constituting the "poisoned fruit" of an unconstitutional and unreasonable arrest and illegal seizure, violative of the Fourth Amendment of the United States Constitution?

2. Whether the petitioner was denied due process of law when the Court refused to allow and permit an evidentiary hearing to determine whether or not the plea to attempted bribery in the second degree was involuntarily induced by and influenced by duress and misrepresentation on the part of the prosecution and the Court?

PARTIES

The parties in the Supreme Court of the State of New York, Appellate Division, Second Department and United States Circuit Court, Second Circuit, were the Petitioner, William Davis, and the Respondent, The People of the State of New York.

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OPINIONS BELOW

1. On June 9, 1976 the Supreme Court of the State of New York, Kings County, denied petitioner's motion to suppress illegally seized evidence, without opinion.

2. On October 11, 1977 the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, reversed the Trial Court's decision convicting petitioner of Attempted Criminal Possession of a Dangerous Weapon, premised upon an unreasonable seizure; that Court affirmed the judgment of conviction as to the crime of Attempted Bribery in the Second Degree, without opinion.

3. On December 12, 1977, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, denied the petitioner's motion for reargument, de novo, without opinion.

4. On December 19, 1977 leave to appeal to the Court of Appeals of the State of New York was denied, without opinion.

5. On March 17, 1978, the Supreme Court of the State of New York, Kings County, denied the petitioner's motion to vacate the judgment of conviction, in the nature of a writ of error coram nobis, pursuant to section 440.10 1(B)(H) of the Criminal Procedure Law of the State of New York, with opinion.

6. On February 19, 1980, the Appellate Division of the Supreme Court of the State of New York, affirmed the denial of the writ of Error Coram Nobis, without opinion.

7. On April 2, 1980, the Court of Appeals of the State of New York denied the petitioner's application for leave to appeal.

8. On November 5, 1980 the United States District Court for the Eastern District of New York denied the petitioner's application for a writ of Habeas Corpus premised upon a copy of the Report and Recommendation of the United States Magistrate.

9. On November 26, 1980, the District Court for the Eastern District of New York denied the petitioner's application for a Certificate of Probable Cause for Appeal to the Circuit Court of Appeals for the Second Circuit, by Memorandum and Order.

10. On April 6, 1981, the United States Court of Appeals for the Second Circuit denied the petitioner's motion for a Certificate of Probable Cause for appeal, without opinion.

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Section 1254, subdivision 1, and Title 28 U.S.C. Section 1257, subdivision 3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§440.10 Motion to vacate judgment.

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

***(b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or

***(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

§ *440.30 Motion to vacate judgment and to set aside sentence; procedure.*

1. A motion to vacate a judgment pursuant to section 440.10 and a motion to set aside a sentence pursuant to section 440.20 must be made in writing and upon reasonable notice to the people. Upon the motion, a defendant who is in a position adequately to raise more than one ground should raise every such ground upon which he intends to challenge the judgment or sentence. If the motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the ground of such belief. The defendant may further submit documentary evidence or information supporting or tending to support the allegations of the moving papers. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, if any, an answer denying or admitting any or all of the allegations of the motion papers, and may further submit documentary evidence or information refuting or tending to refute such allegations. After all papers of both parties have been filed, and after all documentary evidence or information, if any, has been submitted, the court must consider the same for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact.

2. If it appears by conceded or uncontradicted allegations of the moving papers or of the answer, or by unquestionable documentary proof, that there are circumstances which require denial thereof pursuant to subdivision two of section 440.10 or subdivision two of section 440.20, the

court must summarily deny the motion. If it appears that there are circumstances authorizing, though not requiring, denial thereof pursuant to subdivision three of section 440.10 or subdivision three of section 440.20, the court may in its discretion either (a) summarily deny the motion, or (b) proceed to consider the merits thereof.

3. Upon considering the merits of the motion, the court must grant it without conducting a hearing and vacate the judgment or set aside the sentence, as the case may be, if:

(a) The moving papers allege a ground constituting legal basis for the motion; and

(b) Such ground, if based upon the existence or occurrence of facts, is supported by sworn allegations thereof; and

(c) The sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by unquestionable documentary proof.

4. Upon considering the merits of the motion, the court may deny it without conducting a hearing if:

(a) The moving papers do not allege any ground constituting legal basis for the motion; or

(b) The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one; or

(c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof; or

(d) An allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

5. If the court does not determine the motion pursuant to subdivisions two, three or four, it must conduct a hearing and make findings of fact essential to the determination thereof. The defendant has a right to be present at such hearing but may waive such right in writing. If he does not so waive it and if he is confined in a prison or other institution of this state, the court must cause him to be produced at such hearing.

6. At such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

7. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination.

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 20, 1974, three police officers from the City of New York, assigned to a "street crime unit" while in an unmarked police vehicle were informed by an "unknown" and "unreliable" informant that a male, black, approximately six feet tall, wearing a long leather coat, was in possession of a dangerous weapon (gun). Approximately four minutes later the police observed the petitioner walking in the street. The petitioner was then forcibly stopped by the police officers. He was observed throwing an object onto the street. A gun was recovered from the street by the arresting officer. Within minutes, while on route to the police precinct, at the time of the arrest, the petitioner allegedly attempted to bribe one of the arresting police officers.

On May 20, 1975 the petitioner was indicted and charged with the crimes of Bribery in the Second Degree and Criminal Possession of a Weapon in the Third Degree.

Prior to trial the petitioner moved in the Supreme Court of the State of New York, Kings County, to suppress the weapon and his statements made at or about the time of his arrest upon the grounds that an unlawful search and an illegal seizure violated his Fourth Amendment constitutional right. Subsequent to a pre-trial hearing, the Court denied petitioner's motion to suppress.

Thereafter, on January 28, 1977, the petitioner interposed a plea of guilt to the crime of Attempted Bribery in the Second Degree and Attempted Possession of a Weapon in the Third Degree. The transcript of the plea minutes concerning the Attempted Bribery, were, in part, as follows:

"THE COURT: All right, Mr. Davis, on or about December 20, 1974, in the City and State of New York, in

the County of Kings, did you attempt to offer and give to Robert Gallagher, a Police Officer, and member of the police dept., a quantity of money on an agreement that he might influence his judgment?

THE DEFENDANT: No sir, I didn't. Yes, sir."

On February 3, 1977, the petitioner was sentenced to five years probation as a result of a negotiated plea bargain. The representation and promise of probation was made in consideration for a plea to both reduced charges, and not merely to the weapons charge alone.

On October 11, 1977, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, reversed the judgment of conviction for the crime of Attempted Criminal Possession of a Dangerous Weapon upon the grounds that the petitioner's rights pursuant to the Fourth Amendment of the United States Constitution were violated; that Court affirmed the judgment of conviction as to the charge of Attempted Bribery in the Second Degree.

On December 12, 1977, the Court denied the petitioner's motion for reargument.

On December 19, 1977, leave to appeal to the Court of Appeals of the State of New York, pursuant to New York Criminal Procedure Law, Section 450.90 was denied.

On January 23, 1978, the petitioner filed a petition in the Supreme Court of the State of New York, Kings County, for an order pursuant to New York Criminal Procedure Law Section 440.10 (1)(b)(H) also in the nature of a writ of Error Coram Nobis, to vacate the judgment of conviction and plea to the bribery charge. Petitioner also sought an evidentiary hearing upon the ground that the judgment of conviction and plea were obtained by duress and misrepresentation on the part of the prosecution as well as the Court, all in violation of his Constitutional rights to Due Process of Law.

On March 17, 1978, the Supreme Court of the State of New York, Kings County, denied the motion to vacate the judgment of conviction, without an evidentiary hearing.

On August 20, 1979, leave to appeal was granted by the New York Supreme Court, Appellate Division, Second Department, from the order denying the writ of Error Coram Nobis.

On February 19, 1980, the New York Supreme Court, Appellate Division, Second Judicial Department, affirmed the denial of the writ of Error Coram Nobis.

On April 2, 1980, the Court of Appeals of the State of New York, denied leave to appeal.

Simultaneously with the writ of Error Coram Nobis, on November 5, 1980, the United States District Court for the Eastern District of New York denied the petitioner's application for a writ of Habeas Corpus pursuant to Title 28 U.S.C. Section 2254. This denial was premised upon a copy of the Report and Recommendation of the United States Magistrate, dated October 20, 1980.

On November 7, 1980, the petitioner filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit.

On November 17, 1980, the petitioner sought a Certificate of Probable Cause for appeal from the United States District Court for the Eastern District of New York. By memorandum and order dated November 26, 1980, the District Court denied the application.

On December 22, 1980, the petitioner filed a Notice of Motion for a Certificate of Probable cause for appeal to the United States Court of Appeals for the Second Circuit.

On April 6, 1981, the United States Court of Appeals for the Second Circuit denied the petitioner's motion for a Certificate of Probable Cause.

All remedies available to the petitioner both in the State and in the Federal Jurisdictions have been totally and fully exhausted.

REASONS FOR GRANTING THE WRIT

POINT I

THE INITIAL ARREST OF THE PETITIONER WAS DETERMINED, JUDICIALLY, TO BE VIOLATIVE OF HIS CONSTITUTIONAL RIGHTS PURSUANT TO THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION. AS A RESULT, THE ACTIONS AND CONDUCT AND STATEMENTS OF THE PETITIONER IMMEDIATELY FOLLOWING THE ILLEGAL ARREST AND ILLEGAL SEARCH SHOULD HAVE BEEN SUPPRESSED. THE TRIAL COURT'S AND INTERMEDIATE APPELLATE COURTS HAVE FAILED TO ABIDE AND FOLLOW THE RATIONALE OF THIS COURT'S HOLDING IN WONG SUN VS. UNITED STATES (371 U.S. 471). THE ENTIRE RECORD BELOW DEMONSTRATES A COMPLETE FAILURE OF ATTENUATION FROM THE PRIMARY ILLEGAL ARREST AND ILLEGAL SEIZURE.

In *Wong Sun v. United States* (371 U.S. 471) this Court articulated the guiding criteria for determining whether or not evidence derivatively obtained from a violation of the Fourth Amendment is admissible against an accused during a trial. At page 484 this Court held:

> The exclusionary prohibition extends as well to the indirect as the direct products of such invasions."

See also, *Silverthorne Lumber Co. v. United States,* (241 U.S. 385); *Weeks v. United States,* (232 U.S. 383), and *United States v. Crews* (100 S. Ct. 1244).

Subsequent cases have confirmed that the exclusionary sanctions apply to any "fruits" of a constitutional violation encompassing confessions or statements of an accused obtained during an illegal arrest and illegal detention. (*Dunaway v. New York,* 442 U.S. 200; *Brown v. Illinois,* 422 U.S. 590).

In *Wong Sun, supra,* at pages 487-8, this Court prescribed that the inquiry in cases where a preliminary illegality has been demonstrated, be directed to:

> ". . . whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead, by means sufficiently distinguishable to be purged of the primary taint."

In the case at bar, three police officers assigned to a "street crime unit" acting pursuant to an *unreliable* tip from an unknown informant, forcibly stopped and detained the petitioner and recovered a loaded revolver. The seized weapon formed the gravamen of the charges against the petitioner.

Moments later, while the petitioner was being driven to the precinct for processing he allegedly attempted to bribe one of the arresting officers.

Unquestionably, the alleged bribe offer was induced by the illegal seizure. The evidence which gave rise to the alleged bribe offer was illegally obtained. The bribe was tainted by the illegal evidence.

If it were not for the illegal arrest and illegal seizure there would have been no attempt to offer a bribe. There is an obvious and conspicuous nexus between the attempted bribe offer and the illegally obtained weapon. The transaction was almost simultaneous. The actions and conduct of the petitioner as well as the police officers were all part of the same transaction and part of the Res Gestae.

Put another way, the bribery charge was initiated and created by the unlawful conduct of the law enforcement authorities. The crimes of possession of a dangerous weapon and attempted bribery in the case at bar are inherently related to each other. The illegally seized weapon was the subject matter of the attempted bribe.

Strict adherence to the principles of law recited in *Wong Sun, supra,* mandate that the bribery charge be dismissed as the exploitation of the initial illegal arrest and illegal seizure.

The statements of the petitioner immediately following his arrest are not admissible in evidence. The statements do not result from any intervening or independent act of free will by the petitioner, especially where experienced police officers indiscriminately and unlawfully arrested and seized the weapon in his possession. It is unreasonable under such circumstances to infer that the petitioner's responses were sufficiently an act of free will to purge the primary taint of the original unlawful invasion. The exclusionary prohibition extends to such "indirect products of an unlawful invasion."

In *Brown, supra,* this Court identified several factors to be considered in determining whether the statements were obtained as a result of exploitation of an illegal arrest. At page 603-4, this Court stated:

> "The temporal proximity of the arrest and the confession, the presence of intervening circumstances and particularly, the purpose and flagrancy of the official misconduct are all relevant."

Also, in *Brown, supra,* the Court found that the "less than two hours" having elapsed between the arrest and the confession, demonstrated that there was no intervening events of significance whatsoever. Furthermore, the Court held that the arrest without probable cause had a "quality

of purposefulness" in that it was an expedition for evidence undertaken in a discretionary abusive fashion.

It is submitted that the reasoning of *Brown, supra,* should be applied to the instant matter. The statements attributed to the petitioner constituting the alleged bribe offer were made moments after the primary illegality (the illegal arrest and illegal seizure). There was no intervening circumstance between the time of the illegal arrest and the alleged bribe offer. If such behavior is countenanced by this Court, law enforcement would be permitted to randomly arrest and search any citizen "in the hope that something might turn up" (*Brown, supra,* at page 605). Law enforcement would in effect be inviting the unknowing defendant to make statements to them in an attempt to prevent an illegal arrest which the law enforcement officials should realize would never be sustained by and under the prevailing legal standards.

Put another way, the police would be accomplishing indirectly what the law proscribes as a violation of an individual's constitutional rights. This is clearly an exploitation of an illegality.

It is now legion that law enforcement cannot justify an otherwise illegal arrest by that which is recovered. To allow law enforcement to capitalize on the statements made by an arrestee subsequent to an illegal detention and a violation of the arrestee's constitutional rights by bringing about a separate and distinct charge of violation of the law would be tantamount to circumventing the established legal standards.

The conviction for the attempted bribery must not be upheld when it is tainted by the illegal action of the law enforcement authorities.

In *Dunaway v. New York, supra,* this Court reasoned that *Brown's supra,* focus on the causal connection between the illegality and subsequent statements reflected two major policies behind the use of the exclusionary rule. The Court reasoned at page 2259:

"When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the Courts."

The factual issues surrounding the weapon charge directly affect the bribery conviction as well. The entire subject matter concerning the attempted bribe offer was the illegally obtained weapon. The connection between the unconstitutional police conduct and the subsequent statements of the petitioner were not sufficiently attenuated as to uphold the bribery conviction. The petitioner would not have been confronted with a weapons charge prompting him in any manner or form to attempt to bribe a police officer had there been no "illegal arrest."

The action and conduct of the petitioner at the time and immediately subsequent to the arrest could well have been anticipated by the law enforcement officials who knew or should have known that their own actions were unlawful.

To grant suppression of the subject matter of the illegal search but admit the progeny and fruits of the search as to the related bribe offer would do irreputable damage to the constitutional protections and sanctions afforded by the Fourth Amendment. This situation would be legally repugnant and somewhat diabolical when considered in the light of the recent Judicial formats.

Judicial integrity demands that this Court not be made a "party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions" (*Terry v. Ohio*, 392 U.S. 1, 12, 13).

The petitioner did not engage in any conduct attempting to bribe the arresting officers until the contemporary illegal arrest and illegal seizure. Under such circumstances,

it is clear that the statements of the petitioner are tainted by the primary illegality. The link between the illegal search and the illegal seizure and the subsequent attempted bribe offer is direct and immediate. The relationship between the primary illegality and the resulting attempted bribe offer had not "become so attenuated as to dissipate the taint" (*Nardone v. United States,* 308 U.S. 338, 341).

In *People v. Cantor,* (36 N.Y.2d 106) three police officers had blocked the defendant's automobile with their own vehicle. The defendant had exited his automobile and removed a pistol, pointing it at the officers. The officers identified themselves as policemen and seized and arrested the defendant. The New York Court of Appeals reversed the defendant's conviction for possession of a weapon holding, unequivocally, that the initial seizure was unlawful and the fruits of that unconstitutional seizure must be suppressed. The weapon was revealed as a "direct consequence of the illegal nature of the stop."

Similarly, in the case at bar, the attempted bribe offer resulted only as a direct consequence of the illegal arrest and illegal seizure of the weapon.

POINT II

THE PETITIONER'S PLEA OF GUILT IN THE TRIAL COURT WAS NOT MADE VOLUNTARILY AND HIS RIGHTS TO AN EVIDENTIARY HEARING WERE UNREASONABLY DENIED CONSTITUTING A DEPRIVATION OF DUE PROCESS OF LAW.

In *Boykin v. Alabama,* (395 U.S. 238) this Court held that a guilty plea must be voluntary: it must be made with full knowledge of what the plea connotes and what consequences follow.

If a plea of guilt was the product of coercion or it was obtained unfairly, or given through ignorance, fear, or inadvertence, the resulting judgment is void and subject to collateral attack (*U.S. ex rel McGrath v. LaValle,* 348 F.2d 373, C.A. 2nd, 1965).

Under New York State law the mechanism to "collaterally attack" an involuntary or unknowing plea of guilt is found in the New York State Crimina Procedure Law, section 440.10. That section further provides that an accused may seek to vacate a judgment upon the ground that:

> "(b) The judgment was procured by duress, misrepresentation, or fraud on the part of the Court or a Prosecutor or a person acting for or in behalf of a Court or a Prosecutor or, . . .
>
> (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States."

Evidentiary hearings have been interpreted as mandatory under New York State Criminal Procedure Law section 440.30 (the procedural derivative of New York State CPL 440.10) where there are factual allegations

demonstrating that the judgment was procured through prosecutorial duress or misrepresentation (*People v. Lettieri,* 42 A.D. 2nd 863).

In *People v. Bagley* (23 N.Y.2d 814) the Court in holding that the accused was entitled to a hearing pursuant to the criminal procedure law, section 440.10, to contest the validity of his plea of guilt, stated at page 815:

> "Appellant's allegations, although improbable, are neither so incredible as a matter of law, nor so clearly refuted by the record, that he is not entitled to a hearing (see *People v. Richetti,* 302 N.Y. 290)."

In *People v. Session* (34 N.Y. 2nd 254), the Court held that once the submission of evidentiary facts creates an issue as to the validity of the judgment, the defendant is entitled to a hearing pursuant to the Due Process clause of the United States Constitution to determine the truth of his allegations, unless his claim has been completely refuted by documentary evidence (see also *People v. White,* 309 N.Y. 636).

In *People v. Codarre,* (10 N.Y.2d 361) the Court held that a hearing is required when there is evidence of a Due Process Violation.

In the instant matter, the petitioner interposed a plea of guilt to Attempted Possession of a Dangerous Weapon and Attempted Bribery. During the allocution concerning the Attempting Bribery, it is patently clear that the petitioner did not voluntarily and knowingly interpose a plea of guilt. The transcript of the plea minutes pertaining to the allocution on the bribery charge demonstrates as follows:

> "THE COURT: All right, Mr. Davis, on or about December 20, 1974, in the City and State of New York, in the County of Kings, did you attempt to offer and give to Robert Gallagher, a Police Officer, and member of the

Police Dept., a quantity of money on an agreement that that might influence his judgment?

THE DEFENDANT: *No sir, I didn't.* Yes, sir."

In the period of time that transpired between the petitioner's denial of the accusation and his later affirmance of his involvement, he was counseled by his attorney (after a bench conference with the court and the prosecution). The representation and promise of a probationary sentence was conditioned upon the petitioner's plea to both charges. Although the petitioner vigorously protested his innocence to the bribery charge (see petitioner's supporting affidavit) he pled guilty to gain the benefit of the probationary sentence.

The Prosecutor and the Court erroneously misrepresented to the petitioner that the initial arrest and seizure, forming the gravamen of the charges against him, were lawful. The petitioner was advised by his attorney during the allocution that the Court's decision denying suppression would be set aside during the Appellate Process and in order to avoid immediate incarceration, it was necessary for him to interpose a plea of guilt to both charges. The instant plea was undertaken by the petitioner without the understanding of the full ramifications attendant thereto.

It is suggested that had the Prosecutor not misled the trial court and the petitioner into believing that the initial arrest and seizure were lawful, the petitioner would not have pled guilty to the reduced bribery charge. Petitioner's supporting affidavit stated, inter alia, as follows:

"I would never had pleaded guilty to the bribery charge if the motion to suppress the gunhad been granted, because I am not guilty of that charge. I never made any bribery offer or committed any act of bribery to the police officer as charged in the indictment."

Furthermore, it is suggested that the plea to the Attempted Bribery charge was procured by duress by the prosecutor's insistance that the plea be to both charges. The trial court's representation of imposing a probationary sentence was only in consideration for a plea by the petitioner to both particular charges in the indictment. The resulting sentence and promise of probation was directed at a "package deal" and did not concern itself with the legal ramifications of the original illegal arrest and illegal seizure.

The petitioner was obviously coerced by the prosecution and the promise of the Court, to plead guilty to a charge thathe believed himself innocent of in order to avoid immediate incarceration and avail himself of the opportunity to establish to an Appellate Court that his initial arrest and the initial seizure were in fact unlawful.

In *U.S. ex rel Thurmond v. Mancussi,* (275 F. Supp. 508, E.D.N.Y.) the Court held that a plea is involuntary and void if at the time the accused interposed a plea of guilt he believed that a coersive promise or threat had been made either by the Court or the Prosecutor, although, in fact no such promise or threat had been made. The involuntariness of the guilty plea was premised upon the accused's *belief* of the existence of coersion, promise, or threat.

A guilty plea may be withdrawn if the accused's interpretation of the representations made to him, although erroneous, is reasonable and he was thereby misled into pleading guilty. (U.S. ex rel. Thurmond v. Mancussi, supra). In the case at bar, the petitioner was misled into interposing his plea of guilt as a result of the Prosecutor's and Trial Court's insistence that the arrest and seizure were lawful and because of the insistence both by the prosecutor and the Court that a "package deal" be made.

In *People v. Clark,* (45 N.Y.2d 432) the Court held that a plea covering two indictments and conditioned on

the negotiated agreement providing that the accused would receive concurrent sentences on the separate counts to which he pled, must be vacated where statements in connection with the crime of one of the indictments was later suppressed.

At the very least, the Petitioner was entitled to a hearing to determine whether the judgment of the conviction and the plea were obtained by duress and misrepresentation on the part of the Prosecutor and the Court all in violation of his constitutional rights to Due Process of Law.

The petitioner had established a credible, documented case in support of his claim that his plea to the bribery charge was involuntary and coerced. The petitioner's claim was not conclusively refuted by the record but in contradistinction his claim was substantiated by the record. The petitioner had categorically stated on the record that he was not guilty of the bribery charge.

Denial of an evidentiary hearing based upon the unrebuted affidavits of the petitioner was tantamount to a violation of the petitioner's Constitutional Rights to Due Process of Law. Directly applicable to the case at bar is the matter of *Brady v. U.S.*, (397 U.S. 742) where this Court stated at page 757-8:

> "We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged."

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI BE GRANTED.

Respectfully submitted,

MICHAEL S. WASHOR
A Member of the Bar of the
United States Supreme Court

WASHOR & WASHOR, ESQS.
Attorneys for Petitioner
on Petition for Certiorari

APPENDIX A—REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE, DATED OCTOBER 20, 1980.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM DAVIS,

Petitioner,

-against-

THOMAS L. JACOBS, Commissioner of Probation,

Respondent.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

CV 80 1237 (Platt, J.)

Petitioner, William Davis, moves by his attorney for a writ of habeas corpus pursuant to Title 18 United States Code Section 2254.

A guilty plea was accepted by Judge Marano of the Supreme Court of New York, Kings County to the crimes of attempted bribery in the second degree and attempted possession of a weapon in the third degree[1] (Petitioner's petition p. 3). Petitioner was then sentenced to a probationary term of five years (id. at 1).[2] The conviction was appealed to the Appellate Division, Second Department which on October 11, 1977 issued a decision reversing the judgment convicting petitioner of the weapons charge on the ground that it was based on an unreasonable search and seizure under the Fourth Amendment, but affirmed the judgment as to the bribery charge (id. at 4). Petitioner

also brought an action in the nature of coram nobis pursuant to §440 of the New York Criminal Procedure Law, which petition was denied. Petitioner sought leave to appeal to the Appellate Division which affirmed. Leave to appeal to the New York Court of Appeals was denied (Respondent's affidavit p. 3).

Having exhausted his state remedies, petitioner's application for relief under federal habeas corpus is before the undersigned pursuant to Title 28 United States Code §636(b)(1)(B) and Rule 10 of the Rules Governing the Disposition of 28 United States Code §§2254 and 2255 Proceedings in the District Courts, as amended August 1, 1979.

Essentially petitioner raises two arguments. He contends that the attempted bribery charge, which arose out of an arrest for a weapon discovered during an illegal search was the "fruit of the poisonous tree" and should have been dismissed. Petitioner next alleges that the denial of petitioner's coram nobis petition without an evidentiary hearing by the state was violative of the procedural protections of the due process clause under the Fourteenth Amendment.

Federal habeas corpus relief from a state court conviction is limited to those cases involving a fundamental deprivation of a federal constitutional right. *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974). Since New York State permits a defendant to plead guilty without forfeiting his rights to judicial review of specified constitutional issues, including the issue herein alleged, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding. *Lefkowitz v. Newsome,* 420 U.S. 283, 293 (1975). Petitioner thus presents an application alleging a constitutional question.

Petitioner contends that the attempted bribery charge imputed to petitioner was tainted by the unlawful arrest as the "fruit of the poisonous tree" and should have been

dismissed under the Fourteenth Amendment. This contention while interesting is meritless.

Petitioner was initially charged with a weapons and bribery charge to which he later pleaded guilty. The weapons charge was dismissed by the Appellate Division on the ground that plaintiff was subjected to an improper and unconstitutional seizure of his person and that therefore the evidence of a gun should have been suppressed as the fruit of an illegal seizure. *People v. Davis,* 59 A.D. 2d 722 (2nd Dept. 1977). The attempted bribery charge was held to be an independent act and not the fruit of the illegal seizure and as such the conviction was affirmed (id.).

Petitioner centers his argument around the Supreme Court's decision in *Wong Sun v. United States,* 371 U.S. 471 (1963). There the Court prescribed that the court's inquiry in cases where a primary illegality has been demonstrated be directed to

> "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun, supra* at 488 quoting from Maguire Evidence of Guilt, 221.
>
> "Wong Sun, on first glance, appears to hold that verbal evidence and the 'fruits' thereof deriving from an illegal arrest are not admissible into evidence as proof of a crime. Wong Sun, however, does not stand for the proposition that an independent criminal act is to be ignored because it was made during an illegal arrest."

The attempted bribe is a completely independent act. *United States v. Perdiz,* 256 F. Supp. 805, 806 (S.D.N.Y. 1966). In *People v. Puglisi,* 51 A.D. 2nd 695 (Sup. Cr. App. Div. 1st Dept. 1976), the defendant was charged with

attempted possession of a weapon and bribery. The Court stated:

> "However, the bribe offers allegedly made by the defendant were independent acts, of his own volition, and as such were so attenuated as to be purged of the taint of the illegal stop and detention (*People v. Munger,* 37 A.D. 2d 950, App. dism. 33 N.Y. 2d 576). The police did not 'exploit' their original illegal action so as to provoke the defendant into making the bribe offers (*Vineyard v. United States,* 335 F.2d 176, 183, (8th Cir.) *cert. denied* 379 U.S. 930; (1964) *Wong Sun v. United States,* 371 U.S. 471, 488)

Moreover, in *People v. Munger,* 37 A.D. 2d 950 (1971), appeal dismissed 33 N.Y. 2d 576 (1973) the court held that based on the facts therein

> "the bribe offer was an independent and voluntary act. As such it was attenuated so as to be purged of any taint (cites omitted). The concededly illegal search and seizure did not taint the subsequent bribe offer." (cites omitted) 37 A.D. 2d at 950,

contrary to petitioner's assertions.

Also see: *Vineyard v. United States,* 335 F.2d 176, 181 (8th Cir. 1964) *cert. denied* 379 U.S. 930 (1964) (legality of arrest is immaterial in prosecution for subsequent bribery of arresting officer); *People v. Raymo,* 32 Misc. 2nd 534, 535 (Gen. Sessions, N.Y. County 1962) (illegality of search and seizure has no bearing on bribery count); *Mays v. United States,* 289 F. 486, 487 (4th Cir. 1923) *cert. denied* 263 U.S. 706 (1923) (meritless to argue that defendant must be found guilty of offense for which he was arrested in order to also be found guilty of bribery.)

Those cases cited by petitioner in support of this application, while interpreting *Wong Sun* and the effect of

primary and secondary illegalities, are not on point. *People v. Cantor*, 36 N.Y. 2nd 106 (1975); *United States v. Crews*, __U.S.__ 100 S. Ct. 1244 (1980) involve evidence obtained via illegal searches and seizures which is sought to be introduced against the defendant. In essence this improperly obtained evidence is being used to prove the crime alleged. The case at bar, on the other hand, is composed of two crimes, inexorably linked yet independent of one another. While it may be absolutely true that had petitioner not been arrested initially he would not have attempted to bribe the police officer, thus linking the two crimes, the point is irrelevant. Once petitioner attempted to bribe the police officer it became irrelevant to proving that charge whether or not petitioner had been properly arrested at the outset. The bribery charge is deemed an independent act not covered by Wong Sun and its progeny. The appellate division correctly ruled on petitioner's claim so that federal habeas corpus relief does not lie here.

Petitioner next urges that habeas corpus relief be granted on the ground that petitioner was denied procedural due process as guaranteed under the Fourteenth Amendment by the denial of his state coram nobis petition without benefit of an evidentiary hearing. Petitioner contends that the facts, as alleged below, did justify relief and at the very least require an evidentiary hearing.

Petitioner initially sought a writ of error coram nobis alleging that both the trial court and state prosecutor had coerced him into entering a guilty plea to both counts of the indictment. He further alleged that his trial attorney significantly contributed to the coercive atmosphere by proffering mistaken advice.[1] The Appellate Division held that an evidentiary hearing was unnecessary since no factual question was advanced by the petition and that the evidence failed to substantiate the claim that the judgment was obtained in derogation of petitioner's constitutional rights.

Even assuming *arguendo* that the Appellate Division wrongfully denied petitioner an evidentiary hearing, having closely scrutinized the record it can fairly be said that the record fails to indicate the necessity of an evidentiary hearing, either on the state or federal level.

Petitioner has the burden of proof in establishing that his guilty plea was involuntary, *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092, 1097 (2nd Cir. 1972), *cert. denied* 410 U.S. 945 (1973), and he must prove this involuntariness by a preponderance of the evidence. *Harned v. Henderson*, 588 F.2d 12, 22 (2nd Cir. 1978). Petitioner must therefore establish that his guilty plea was obtained only as a result of duress and misrepresentations on the part of the trial court, trial counsel and the prosecutor. Petitioner fails to sustain that burden.

Petitioner entered guilty pleas on three separate occasions to both the weapon and bribery counts.[4] Following the first two pleas, the trial court permitted petitioner to withdraw his guilty pleas inasmuch as the trial court found itself unable to fullfill its sentencing promise.[5] Petitioner once again then offered to withdraw his not guilty plea and plead guilty to both counts of the indictment. The plea of guilty was accepted following a lengthy discussion between the court and the petitioner. At each allocution the petitioner stated he had not been threatened or induced to plead guilty. The court subsequently sentenced the petitioner in accordance with its earlier promise.

Each aspect of petitioner's allegation will now be discussed individually. Petitioner contends that the coercive impact of the trial court resulted from the trial court's incorrect ruling on petitioner's suppression motion.[6] Petitioner cites cases which on first blush seemingly support his argument. For example, in *People v. Grant*, 45 N.Y. 2d 366 (1978) a pretrial motion to suppress a confession was denied. The defendant went to trial and at the close of the people's case the defendant pleaded guilty to murder.

On Appeal the court held that the motion to suppress was improperly denied. The question raised thus becomes whether there exists a reasonable possibility that the error contributed to the plea. The Court held

> "In sum, when a conviction is based on a plea of guilty an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision unless at the time of the plea he states or reveals his reason for pleading guilty. This is especially true when the defendant has unsuccessfully sought to suppress a confession." *People v. Grant, supra* at 379-380.

This case as well as the others cited by petitioner to support this point are distinguishable from the instant case in one decisive aspect.

In the case at bar, petitioner entered pleas of guilty to two individual charges whereas in *People v. Grant, supra,* the plea was entered solely to the murder charge. Also in *People v. Grant, supra,* the denial of the suppression motion could very well have contributed to the defendant's decision to plead guilty since presumably the confession was inexorably linked to the murder charge. It cannot be said, however, that the denial of petitioner's suppression motion re the gun was similarly linked to the pleas of guilty to both the weapons and bribery charges although it is conceivable that the denial of the motion may have influenced the petitioner's plea of guilty to the weapons charge. In that light and relying on *People v. Grant, supra,* vacature of the guilty plea entered to the weapons charge would not be improper since it is impossible to say with any degree of certainty that the effect of the denial of the suppression motion on the guilty plea was negligible.[7] The petitioner takes this point one step further. He alleges that had the suppression motion been granted he never would have pleaded guilty to either the weapons charge or

the bribery charge. As detailed earlier, the two charges are completely independent of one another.

With respect to petitioner's contention that trial counsel had coerced him into entering a guilty plea, absent a specific showing of coercion a plea of guilty entered on the advice of counsel is not grounds for habeas corpus relief. *Humphries v. Green,* 397 F.2d 67, 70 (6th Cir. 1968). Petitioner has not shown coercion although he claims that his attorneys proffering mistaken advice should be viewed as inherently coercive. In *McMann v. Richardson,* 397 U.S. 759, 770 (1970) the Court held that

> "a defendant's plea of guilty based on reasonable competent advice is an intelligent plea not open to attack. . . ."

The court earlier explained

> ". . . a decision to plead guilty must necessarily rest upon counsel's answers (to questions involving the plea), uncertain as they may be. Waiving trial entails the inherent risk that the good faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts."

McMann v. Richardson, supra at 770. Since petitioner fails to allege the incompetency of trial counsel it cannot be said that the trial attorney's advice was totally unreasonable.

Finally, while petitioner contends that the prosecuting attorney was unreasonable in coercing the petitioner's guilty plea he fails to substantiate that claim with factual allegations. Bare conclusory allegation are not sufficient grounds upon which to grant relief. See *United States ex. rel. Gentile v. Mancusi,* 426 F.2d 238, 240 (2nd Cir. 1970) *cert. denied* 400 U.S. 944 (1970).

To conclude, it was not error, nor a violation of petitioner's constitutional rights, to deny his coram nobis peti-

tion absent an evidentiary hearing for the simple reason that even if petitioner's allegations are to be believed they do not afford a sufficient basis upon which to grant relief. Where a defendant is not entitled to relief even if his allegations in his petition for writ or error coram nobis are taken as true, a court if entitled to deny the motion without a hearing. *People v. Tomaselli,* 7 N.Y. 2d 350, 356 (1960).

Furthermore, the Court is not required to hold an evidentiary hearing into the alleged coercive atmosphere of the plea taking inasmuch as the factual allegations are insufficient to warrant relief. "The petitioner's mere self-serving allegations of coercion unsupported by any other specific credible evidence are insufficient under the circumstances to require an evidentiary hearing. (cites omitted)." *Clayton v. Estelle,* 541 F.2d 486, 488 (5th Cir. 1976). Also see *Townsend v. Sain,* 372 U.S. 293, 312 (1963).

CONCLUSION

For the foregoing reasons the undersigned respectfully recommends that petitioner's application for federal habeas corpus relief be denied.

Dated: Brooklyn, New York
October 20, 1980

s/ A. Simon Chrein
A. SIMON CHREIN
United States Magistrate

FOOTNOTES

1. New York McKinney's Penal Law §200.00 and 265.02, respectively.

2. A person on probation is "in custody" for purposes of a habeas corpus proceeding. *United States ex. rel. B v. Shelly,* 430 F.2d 215 (2nd Cir. 1970).

3. A fair reading of the record in this case suggests an additional non-articulated ground for habeas relief, to wit, ineffective assistance of counsel. Inasmuch as counsel has not raised the issue herein, nor does it appear to have been raised below, the exhaustion requirement of §2254 has not been met, precluding this Court from reaching the merits of that issue.

4. November 17, 1975; October 21, 1976; January 28, 1977. (See Respondent's State Court Brief Appendix; Petitioner's Exhibit B).

5. January 23, 1976; December 16, 1976 (id.)

6. Petitioner sought to suppress a gun found on his person during what he contends was an arrest executed without probable cause. The trial court denied the suppression motion, holding probable cause to arrest existed. The Appellate Division reversed, finding that the police lacked the requisite probable cause to arrest. The subsequent search was therefore held illegal necessitating the suppression of any evidence theretofore seized.

7. The state courts have previously dismissed the attempted possession of a weapon charge thereby obviating the need for further discussion of that point.

APPENDIX B—MEMORANDUM AND ORDER, DISTRICT COURT JUDGE PLATT, D.J. DATED NOVEMBER 4, 1980, DENYING PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM DAVIS,

Petitioner,

-against-

THOMAS L. JACOBS, Commissioner of Probation,

Respondent.

CV 80-1237
MEMORANDUM & ORDER
November 4, 1980

PLATT, D.J.

On the basis of and for the reasons stated in the report and recommendation dated October 20, 1980 of United States Magistrate A. Simon Chrein, and no objections having been filed with respect thereto, petitioner's application for a writ of habeas corpus pursuant to 18 U.S.C. §2254 must be, and the same hereby is, denied.

SO ORDERED.

s/ Thomas C. Platt
U.S.D.J.

APPENDIX C—NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED NOVEMBER 7, 1980.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM DAVIS,

Petitioner,

-against-

THOMAS I. JACOBS, Commissioner of Probation,

Respondent.

NOTICE OF APPEAL
Civil Action No. CV 80-1237

SIRS:

PLEASE TAKE NOTICE that the within-named Petitioner WILLIAM DAVIS hereby appeals to the United States Court of Appeals for the Second Circuit, from an Order of the United States District Court, Eastern District of New York (Platt, D.J.) made November 4, 1980 and entered in the Clerk's Office November 5, 1980, denying Petitioner's application for a Writ of Habeas Corpus pursuant to 18 USC 2254.

Dated: Brooklyn, New York, November 7, 1980

s/ Aaron Nussbaum
AARON NUSSBAUM
16 Court Street
Brooklyn, New York 11241
Attorney for Petitioner

TO: CLERK, USDC, EDNY
HON. EUGENE GOLD,
DISTRICT ATTORNEY, KINGS COUNTY.

APPENDIX D—MEMORANDUM AND ORDER OF DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, HONORABLE JUDGE PLATT, D.J. DATED NOVEMBER 26, 1980, DENYING PETITIONER'S APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM DAVIS,

Petitioner,

against

THOMAS L. JACOBS, Commissioner of Probation,
Respondent.

CV 80-1237
MEMORANDUM & ORDER
November 26, 1980

PLATT, D.J.

On November 4, 1980, this Court denied petitioner's application for a writ of habeas corpus. On November 17, 1980, Davis petitioned this Court pursuant to 28 U.S.C. §2253 for a Certificate of Probable Cause to enable him to appeal that denial.

The determination of petitioner's application involves the question of whether there exists "probable cause" for an appeal. *United States ex rel. LaMarca v. Denno,* 257 F.2d 295, 297 (2d Cir.), *cert. denied,* 355 U.S. 920 (1958). *See also United States ex rel. Winfield v. Cascles,* 403 F.Supp. 956, 959 (E.D.N.Y. 1975). Congress' rationale in requiring State prisoners to obtain Certificates of Pro-

bable Cause was to "eliminate the abuse of the writ of habeas corpus in the federal courts by the undue interference with state processes incident to protracted appellate proceedings in frivolous cases." *Ex parte Farrell,* 189 F.2d 540, 543 (1st Cir.), *cert. denied sub nom., Farrell v. O'Brien,* 342 U.S. 839 (1951). *See also United States ex rel. Siegal v. Follette,* 290 F.Supp. 636 (S.D.N.Y. 1968). Some courts have said that a Certificate of Probable Cause requires a "substantial question worthy of consideration." *United States ex rel. Stewart v. Ragen,* 231 F. 2d 312 (7th Cir. 1956). *See also Gardner v. Pogue,* 558 F.2d 548, 551 (9th Cir. 1977); *Gordon v. Secretary of State of Wis.,* 462 F.Supp. 307, 308 (E.D. Wis. 1978). Other courts have stated that there must be "federal questions adequate to deserve encouragement to proceed further." *United States ex rel. Jones v. Richmond,* 245 F.2d 234 (2d Cir.), *cert. denied,* 355 U.S. 846 (1957). However, no matter which standard of "probable cause" is chosen, this Court finds no basis for granting the Certificate.

Petitioner raises two claims in this appeal. He contends first that his plea of guilty to the attempted bribery charge is the "poisoned fruit" of the unconstitutional weapons charge and as such should have been dismissed. The concept of "poisoned fruit" however, does not encompass situations such as this where the two crimes charged are independent of one another, though certainly related. *See Vinyard v. United States,* 335 F.2d 176 (8th Cir.), *cert. denied,* 379 U.S. 930 (1964); *United States v. Perdiz,* 256 F.Supp. 805 (S.D.N.Y. 1966). The bribery offers made by the petitioner were acts of his own volition, sufficiently attenuated from the illegal search and seizure as to be purged of any taint. *See People v. Munger,* 37 A.D.2d 950 (1971), *appeal dismissed,* 33 N.Y.2d 576 (1973).

Additionally, petitioner asserts that the guilty plea was coerced due to the misrepresentation of the District

Attorney. The burden of proof is on the petitioner to establish the involuntariness of this guilty plea, *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092, 1097 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973), and it must be demonstrated by a preponderance of the evidence, *Harned v. Henderson*, 588 F.2d 12, 22 (2d Cir. 1978). Petitioner fails to sustain this burden. Bare conclusory allegations are not sufficient grounds upon which to grant relief. *See United States ex rel. Gentile v. Mancusi*, 426 F.2d 238, 240 (2d Cir.), *cert. denied*, 400 U.S. 944 (1970). Accordingly, petitioner's application for a Certificate of Probable Cause is denied.

SO ORDERED.

s/ Thomas C. Platt
U.S.D.J.

APPENDIX E—ORDER AND DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, DATED OCTOBER 11, 1977 DENYING THE PETITIONER'S APPEAL.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 11, 1977.

HON. VINCENT D. DAMIANI, Justice Presiding,
HON. J. IRWIN SHAPIRO,
HON. MILTON MOLLEN,
HON. FRANK D. O'CONNOR. Associate Justices

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v.

WILLIAM DAVIS,
Appellant.

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named William Davis, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered February 3, 1977, convicting him of attempted bribery in the second degree and attempted criminal possession of a weapon in the third degree, upon a plea of guilty, and imposing sentence; the said appeal also brings up for review the denial, after a hearing, of

defendant's motion to suppress physical evidence; and the said appeal having been submitted by Aaron Nussbaum, Esq., of counsel for the appellant, and submitted by Michael J. Halberstam, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby modified, on the law and the facts, the motion to suppress granted, the conviction of attempted criminal possession of a weapon in the third degree, and the sentence imposed thereon, are reversed, and the count of the indictment upon which said conviction is based is dismissed; and, as so modified, the said judgment is unanimously affirmed.

Enter:

September 12, 1977

The People, etc., Respondent, v. William Davis, Appellant.

Aaron Nussbaum, Brooklyn, N.Y., for appellant.

Eugene Gold, District Attorney, Brooklyn, N.Y. (Michael J. Halberstam of counsel), for respondent.

Appeal by defendant from a judgment of the Supreme Court, Kings County, rendered February 3, 1977, convicting him of attempted bribery in the second degree and attempted criminal possession of a weapon in the third degree, upon a plea of guilty, and imposing sentence. The appeal also brings up for review the denial, after a hearing, of defendant's motion to suppress physical evidence.

Judgment modified, on the law and the facts, motion to suppress granted, the conviction of attempted criminal possession of a weapon in the third degree, and the sentence imposed thereon, are reversed, and the count of the indictment upon which said conviction is based is dismissed. As so modified, judgment affirmed.

On December 20, 1974 three police officers assigned to a "street crime unit," in an unmarked police vehicle, were told by an "unknown" informant that "a male Black, approximately *** six feet tall, wearing a long brown suede coat that appeared to be leather, was in possession of a gun *** [and] had just left *** [the] location." Four minutes later and three blocks away, the officers observed the defendant-appellant walking on the street. Since the defendant fit the vague description, he was forcibly stopped by the three police officers, with their guns drawn, and he was observed to throw an object onto the street The object was recovered and proved to be a loaded revolver. While he was being driven to the precinct, the defendant allegedly attempted to bribe one of the arresting officers. The defendant moved to suppress the weapon as the fruit of an illegal search and seizure, but this motion was denied. He thereafter entered a plea of guilty to attempted bribery in the second degree and attempted criminal possession of a weapon in the third degree.

The judgment must be modified by reversing the conviction of attempted criminal possession of a weapon and dismissing the count of the indictment upon which said conviction is based, as the People fully, and with candor, concede. It is clear that when the defendant was forcibly stopped at gunpoint, predicated upon the vague physical description given by an "unknown" informant, he was subjected to an improper and unconstitutional seizure of his person (see *People v. Figueroa*, __AD2d__ [2d Dept., dec. June 27, 1977]; *People v. De Bour*, 40 NY2d 210, 223;

People v. Cantor, 36 NY2d 106, 111; *Terry v. Ohio,* 392 US 1, 21; cf. CPL 140.50). Consequently, the motion to suppress the gun, as the fruit of an illegal seizure, should have been granted.

The defendant also argues that the first count of the indictment, charging bribery in the second degree should likewise be dismissed inasmuch as there exists an "integral causal connection between the illegal arrest and the attempted bribery 'to dispose of the weapons charge' " and, hence, but for the illegal arrest, no attempt to bribe would have occurred. The argument, as a matter of law, does not stand up under careful scrutiny. An attempt to bribe subsequent to an improper arrest is clearly an independent, unrelated act, lacking a causal connection, and is so "attenuated *** as to be purged of any taint" (*People v. Munger,* 37 AD2d 950, app dsmd 33 NY2d 576; see, also, *People v. Stewart,* 41 NY2d 65, 70; *People v. Martinez,* 37 NY2d 662; *Vinyard v. United States,* 335 F2d 176, cert den 379 US 930).

We note that defendant does not contend that he would not have pleaded guilty to attempted bribery if the motion to suppress the gun had been granted. Hence we do not reach that issue. Accordingly, the attempted bribery conviction must be sustained.

DAMIANI, J.P., SHAPIRO, MOLLEN and O'CONNOR, JJ., concur.

EXHIBIT "F"

ORDER DENYING WRIT OF ERROR CORAM NOBIS, DATED JULY 17, 1979, FROM THE SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY, HONORABLE JUDGE LUIGI R. MARANO.

At a Criminal Term, Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, 360 Adams Street, Brooklyn, New York, on the 17th day of July, 1978

PRESENT:
HON. LUIGI R. MARANO,
JUSTICE

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

WILLIAM DAVIS,

Defendant.

Indictment No. 2029/75
Writ of Error Coram Nobis
Argued 2/16/78
Aaron Nussbaum, for the Motion
Eugene Gold, D.A., Kings County in Opposition

The following papers, numbered 1 to 4 submitted on this motion:

Notice of Motion and Affidavits, Affirmations, Orders to Show Cause and Affidavits, Affirmations, Writ

of Habeas Corpus and Petition, Answering Affidavits, Affirmations, Replying Affidavits, Affirmations, papers numbered 1, 2, 3, 4.

MEMORANDUM

SUPREME COURT, KINGS COUNTY

PEOPLE OF THE STATE OF NEW YORK

vs.

WILLIAM DAVIS

BY MARANO, J.
DATED MARCH 17, 1978

Hon. Eugene Gold
District Attorney, Kings County
By: Michael J. Halberstam,
Assistant District Attorney, of Counsel
for the People
Municipal Building
Brooklyn, New York 11201

By: Aaron Nussbaum
Attorney for Defendant
Office & P.O. Address
16 Court Street
Brooklyn, N.Y.

Defendant William Davis, has moved for an order pursuant to CPL 440.10(b)(h); and in the nature of a common law writ of error coram nobis, vacating the judgment

of conviction and plea of guilty thereon, heretofore entered against the above-named defendant of the 3rd day of February, 1977, to the crime of Attempted Bribery in the second degree, and granting a hearing thereon to determine whether such judgment and plea of guilty should be vacated and set aside, upon the following grounds:

1. That the judgment of conviction and plea of guilty were obtained by duress and misrepresentation on the part of the court.

2. That the judgment and plea of guilty were obtained in violation of the defendant's constitutional rights to due process of law.

The defendant's attorney, at the time of the plea, advised his client that the court's promise of probation was only in consideration for a plea to both charges in the indictment, namely, possession of weapon and bribery, and that in his opinion, there was every likelihood that the denial of the suppression motion on the weapon charge would be reversed on appeal, and that the conviction and plea on the bribery charge would necessarily have to be reversed as well, as the fruit of the poisoned tree.

The defendant pleaded guilty to both charges. The Appellate Division subsequently reversed the trial court's denial of the defendant's motion to suppress the evidence of the gun which was the basis of the weapons charge.

The undisputed record clearly indicates that the defendant was represented by able counsel who made the plea in behalf of his client. The court interrogated the defendant thoroughly and the defendant freely admitted his guilt to the charges made against him. (See minutes of Plea, Oct. 21, 1976). On the date of sentencing, February 3, 1977, the defendant was asked if he had anything to say why the judgment should not be pronounced against him. He responded he did not.

Defendant stated that he would not have pleaded guilty to the bribery charge if the motion to suppress had been

originally granted, and that the plea to the bribery charge was procured by duress as a direct result of the improper denial of the suppression motion.

CPL #440.10(1) (b) provides that a defendant may seek to vacate judgment on the ground that "the judgment was procured by duress, misrepresentation or fraud on the part of the court or a person acting for or in behalf of a court or a prosecutor." A claim that the defense consel induced the defendant to plead guilty will not constitute grounds for vacation. (Peo. v. Cowen, 68 Misc. 2d 660, 328 N.Y.S.2d 111 (1971).

The purpose of a writ of coram nobis is to call up facts unknown at the time of judgment. Its function is simply to call certain matters to the attention of the court in which the case was tried. (Peo. v. McCullough, 1949, 300 N.Y. 107). It was designed to call up facts which affect the validity and regularity of the judgment itself and which, if known to the court, would have precluded the judgment rendered. (Peo. v. Farina, 1971, 65 Misc. 2d 970, 319 N.Y.S. 2d 166). The writ advises the court that the court may correct its own records. (Peo. v. Weenink, 1953, 203 Misc. 1971, 119 N.Y.S. 2d 682).

Coram nobis is an emergency measure to afford a defendant a remedy against injustice when no other avenue of judicial relief is, or even was, available to him. (Peo. v. DeMino, 1970, 35AD 2d 979, 317 N.Y.S. 2d 929).

It was devised in order to permit a person wrongfully detained to call to court's attention facts outside the record and unknown at the time of judgment which if known, would have changed or have prevented the judgment, and it is permitted only where such error of fact and not of law existed, affecting the validity and regularity of the proceedings, and not appearing on the face of the record. (Peo. v. Mons, 1949, 195 Misc. 479, 92 N.Y.S.2d 14).

Coram nobis relief is available only were action on the part of the State brought about a denial of effective assistance of counsel or an interference with defendant's right to such assistance (Peo. v. tomaselli, 7 N.Y. 2d 350).

No true question of fact exists. The alleged facts, even if true, are not fit grounds for a writ of error coram nobis. The alleged misinformation given by counsel, chosen by defendant, cannot be attributed to action on the part of the State and does not constitute a denial of due process.

Error of judgment of defendant's counsel affords no basis for post judgment relief. (Peo. v. Brown, 7 N.Y. 2d 359, 197 N.Y.S. 2d 795; Peo. v. Ortiz, 1966 50 Misc. 2d 451, 270 N.Y.S. 2d 445).

Coram nobis may not be utilized as an alternative remedy to withdraw a plea. (Peo. v. Johnson, 1958, 10 Misc. 2d 103, 172 N.Y.S. 2d 457).

There is no evidence presented which indicates the judgment was obtained in derogation of defendant's constitutional rights.

The plea minutes considered by the court demonstrate that the presumption of regularity is buttressed with proof. By the defendant's own admission, he was represented by counsel of his own choosing. The minutes reveal the judge's consideration for the defendant's rights in interrogating both defendant and his lawyer before the plea was taken. The defendant's guilty plea was given knowingly and voluntarily under circumstances affording him his full constitutional rights and it therefore cannot be set aside. (People v. Moore, 1971, 36 A.D.2d 866, 320 N.Y.S. 2d 320).

The remedy of coram nobis is not available to the petitioner. The charge is lacking in factual support and the defendant is not entitled to a hearing. (Peo. v. Ortiz, supra).

In addition the defendant had available the remedy of a motion to withdraw his plea if the procedure under

which his plea of guilty was taken violated due process. He did not make such motion. Coram nobis may not now be used by defendant in his belated attempt to assert alleged rights when, at the time sentence was imposed, he had available another avenue of judicial process to escape any claimed injustice. (Peo. v. Sadness, 300 N.Y. 69).

The defendant's contention that the plea of guilty was made as a result of the court's adverse ruling on the admissibility of the weapon, and that subjected him to pressure to change his plea constitutes no legal basis to grant a writ of error coram nobis, and does not entitle defendant to a hearing (Peo. v. Ortiz, supra.).

Motion denied.

Luigi R. Marano
J.S.C.

Upon the foregoing papers, the argument herein, an opinion of the Court herein, it is

ORDERED that the Writ of error Coram Nobis be and the same hereby is denied.

ENTER,

s/Luigi R. Marano
Luigi R. Marano, J.

Entered July 17, 1978

APPENDIX G—PETITIONER'S AFFIDAVIT SEEKING AN EVIDENTIARY HEARING TO SET ASIDE THE PLEA, DATED JANUARY 23, 1978

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

WILLIAM DAVIS,

Defendant.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF KINGS) ss.:

WILLIAM DAVIS, being duly sworn, deposes and says:

1. I am the within-named defendant herein.

2. On or about May 20, 1975, an indictment was filed against me in the Supreme Court, Kings County, charging me with the crimes of Bribery in the Second Degree (First Count) and Criminal Possession of a Weapon in the Third Degree (Second Count). A copy of the indictment is hereto annexed, marked *Ex. A.*

3. On February 3, 1977, after a hearing in which the trial judge denied my application to declare my arrest unlawful and suppress the illegally seized weapon, I was compelled to plead guilty to Attempted Possession of a Weapon in the Third Degree and Attempted Bribery in the Second Degree under both counts of the indictment, and I was sentenced to probation for five years.

Subsequently, on October 11, 1977, the Appellate Division reversed the judgment of conviction against me rendered as aforesaid for Attempted Criminal Possession of a Gun in the Third Degree (Second Count) on the ground that the gun had been illegally seized in violation of my constitutional rights under the Fourth Amendment. However, the Court affirmed the judgment of conviction as to the First Count, under which I pleaded guilty at the same time to Attempted Bribery in the Second Degree. A copy of the Court's decision is hereto annexed, marked *Ex. B.*

5. This affidavit is respectfully submitted in support of my application to set aside the plea and judgment of conviction rendered against me on February 5, 1977, as aforesaid, with respect to the First Count Attempted Bribery in the Second Degree.

6. The basis of my application to vacate the judgment aforesaid, is that I had been forced to plead guilty to the bribery counts of the indictment solely because the trial court had denied my motion to suppress the illegally seized gun, after a hearing.

I would never have pleaded guilty to the bribery charge if the motion to suppress the gun had been granted, because I am not guilty of that charge. I never made any bribe offer or committed any act of bribery to the police officer as charged in the indictment.

7. I pleaded guilty to the bribery count, as well as to the gun charge for the reason that my trial attorney, Frederick Schurr, Esq., stated to me, at the time the plea was taken, that in his opinion the suppression motion should have been granted and that the Court's decision denying suppression will be set aside on an appeal to the Appellate Division. My Attorney, Mr. Schurr, further stated to me that in his opinion, the bribery count would be also set aside by this Court as the "poisoned fruit" of the illegal search and seizure.

8. In this connection, I respectfully call the Court's attention to the record of the plea taken on January 28, 1977, which confirms the fact that I am not guilty of the bribery charge and I so stated to the Court at page 193:

> THE COURT: All right, Mr. Davis, on or about December 20, 1974, in the City and State of New York, in the County of Kings, did you attempt to offer and give to Robert Gallagher, a Police Officer, and member of the Police Dept., a quantity of money on an agreement that that might influence his judgment?
>
> THE DEFENDANT: *No sir, I didn't. Yes, sir.*

9. I most respectfully state to the Court that immediately after I answered the Court *"No sir, I didn't"*, there was a discussion and conference that took place between my attorney Mr. Frederick Schurr and myself. Mr. Schurr told me that if my appeal on the gun charge would be successful, then the bribery charge would also have to go. Following this discussion and assurance by my counsel, I then changed my answer to "Yes, sir", as above noted in the transcript of the minutes.

WHEREFORE, in the interests of justice, I respectfully request the Court to vacate the plea and judgment of conviction as to the bribery charge, and to grant me an opportunity of a trial to prove my innocence of the bribery charge of which I have been unjustly convicted under the facts and circumstances above set forth.

s/ William Davis

Sworn to before me this
23rd day of January, 1978.
s/ Aaron Nussbaum
AARON NUSSBAUM
Notary Public, State of New York
No. 24-246825
Qualified in Kings County
Commission Expires March 30, 1979

APPENDIX H—PETITIONER'S ATTORNEYS AFFIDAVIT IN SUPPORT OF A REQUEST FOR AN EVIDENTIARY HEARING, DATED JANUARY 23, 1978

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

WILLIAM DAVIS,

Defendant.

AFFIRMATION

FREDERICK SCHURR, ESQ., an attorney at law, admitted to practice in the courts of the State of New York, hereby affirms the truth of the following statement under penalties of perjury:

1. I was the attorney for the defendant WILLIAM DAVIS in a criminal proceeding Indictment No. 2029/75 Supreme Court, County of Kings, and represented Mr. Davis as his attorney throughout all the proceedings therein, including a suppression hearing held before Hon. Norman J. Felig, JSC, on March 2, 1976, and in all plea and sentence proceedings culminating therein.

2. This affirmation is respectfully submitted in support of the within motion by the defendant to vacate the judgment of conviction and plea of guilty thereunder rendered on February 3, 1977, in the Supreme Court, Kings County, on the stated ground that the said judgment and plea were obtained in violation of the defendant's constitutional rights to due process of law.

3. I have read the annexed affidavit of William Davis verified January 23, 1978. I unreservedly confirm the truth and correctness of Mr. Davis' representations made therein that he would not have pleaded guilty to the bribery count under the indictment if the motion to suppress had been originally granted in the Court below, for the reason that Mr. Davis had at all times declared that he was innocent of the bribery charge set forth in the indictment.

4. I have a clear and distinct recollection that at the time of the taking of the plea on January 28, 1977, Mr. Davis emphatically denied that he had attempted to bribe the police officer; that when the Court originally asked him whether he was guilty of that charge, Mr. Davis said: "No sir, I didn't"; that immediately thereafter, I held a conference and discussion with Mr. Davis, at which time I informed him that Judge Marano's promise of probation was only in consideration for a plea to both charges in the indictment, not merely to the weapons charge alone. Even though Mr. Davis continued to profess his innocence to the bribery charge, he chose to avail himself of the promise of probation covering both charges inasmuch as I told Mr. Davis that, in my opinion, there was every likelihood that the denial of the suppression motion on the weapon charge would be reversed on appeal, and that the conviction and plea on the bribery charge would necessarily have to be reversed as well as the "fruit of the poisoned tree"; and that immediately following these assurances to the defendant Mr. Davis, changed his answer to the Court concerning the bribery charge to "Yes, sir", instead of "No sir, I didn't," as is now clearly reflected in the minutes of the plea aforestated.

s/ FREDERICK SCHURR

Dated: January 23, 1978

APPENDIX I—ORDER DENYING A CERTIFICATE OF PROBABLE CAUSE FOR APPEAL BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED APRIL 6, 1981.

CV 80-2333

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM DAVIS, Appellant

v.

THOMAS L. JACOBS, Commissioner of Probation

NOTICE OF MOTION FOR CERTIFICATE OF PROBABLE CAUSE FOR APPEAL

Judge or agency whose order is being appealed: Hon. Thomas C. Platt, USDJ, EDNY.

Brief statement of the relief requested: Certificate of probable cause for appeal, pursuant to 28 USC 2253 a Rule 22(b) Federal Rules of Appellate Procedure.

Previous requests for similar relief and disposition: Application for certificate of probable cause for appeal denied Nov. 17, 1980 (Platt, D.J.).

Statement of the issue(s) presented by this motion: Denial of Appellant's coram nobis petition in state court, without a hearing, was constitutional error. (pp. 2-3). Coerced plea of guilty to charge of attempted bribery, notwithstanding Appellant's innocence of that charge as documented in transcript of plea required vacature of plea and conviction (p. 11).

Brief statement of the facts (with page references to the moving papers): At time of Appellant's plea of guilty to alleged bribery charge, he categorically stated to the Court that he was not guilty of that charge (p. 11); Appellant's plea of guilty was coerced by erroneous and unconstitutional denial of motion to suppress illegally seized evidence. (p. 3). In view of Appellant's claim of innocence, *Wong Sun v. United States,* 371 US 471 is directly applicable in view of unlawful arrest of Appellant.

Summary of the argument (with page references to the moving papers): The merits of the factual dispute were not resolved in the State court hearing (28 USC 2254(1); the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing (28 USC 2254(2); the material facts were not adequately developed at the State court hearing (28 USC 2254(3); appellant did not receive a full, fair and adequate hearing in the State court, and was denied due process of law (28 USC 2254(6)(7), (pp. 2-3)

Date: Jan. 8, 1981

s/ Aaron Nussbaum
AARON NUSSBAUM
Attorney for Appellant

ORDER

IT IS HEREBY ORDERED that the motion for a certificate of probable cause be and it hereby is denied

s/ Henry J. Friendly
HON. Henry J. Friendly, USCJ

s/ Walter R. Mansfield
HON. Walter R. Mansfield, USCJ

s/ Bernard Newman
HON. Bernard Newman, U.S.Court

Date: 4-6-81